

State of New Hampshire



PERSONNEL APPEALS BOARD

25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

Appeal of Judy Thomas

Docket #2019-T-012

Department of Health and Human Services

Division of Children, Youth, and Families

January 28, 2020

The New Hampshire Personnel Appeals Board met in public session on Wednesday, November 20, 2019, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Judy Thomas, the Appellant. The following commissioners heard the above captioned matter: Chair Christopher Nicolopoulos, Esq., Vice Chair Norman Patenaude, Esq., and Commissioner Marilee Nihan. Ms. Thomas, who was represented at the hearing by Attorney Gary Snyder, appealed her termination as a Paralegal II. Assistant Attorney General Jennifer Ramsey and Assistant Attorney General Heather Norville appeared on behalf of the State.

The record of the hearing in this matter consists of pleadings filed by the parties prior to the date of the hearing, notices and orders issued by the Board, the audio recording of the hearing on the merits of the appeal, and documents admitted into evidence.

THE FOLLOWING PERSONS GAVE SWORN TESTIMONY:

Ross McLeod, Staff Attorney-Concord District Office

Barbara Bradshaw, Former Staff Attorney-Rochester District Office

Deanna Baker, Director of Legal Services at DCYF

Judy Thomas, Appellant

ISSUES OF LAW:

Per 1002.02

BACKGROUND:

The Appellant began her employment with the State on April 27, 2018 and was dismissed from the Department of Health and Human Services, Division For Children, Youth, and Families (hereinafter DCYF) as a Paralegal II on April 15, 2019, making her a probationary employee. The State alleges that the Appellant failed to meet the required work standards including, but not limited to, the Appellant's ability to communicate, to effectively supervise subordinates, to effectively and efficiently manage her time, and to take corrective action as directed.

The Appellant argues that her dismissal was arbitrary, capricious, illegal, and/or made in bad faith. She alleges that she was a good employee with a strong work ethic but routinely received negative criticism from her supervisor. The Appellant also alleges that her supervisor demonstrated a pattern of discrimination due to her race and national origin.

Due to the Appellant being a probationary employee, the Appellant must prove, by a preponderance of the evidence, that the dismissal was arbitrary, illegal, capricious or made in bad faith.

After carefully considering the parties' testimony, evidence and arguments, the Board made the following findings of fact and rulings of law.

FINDINGS OF FACT:

1. The Appellant began her employment with DCYF as a Paralegal II on April 27, 2018. The offer of employment letter states, in relevant part, "I am very pleased that you have accepted our offer of employment and I look forward to working with you. You will be a valuable addition to our organization." (State's Exhibit #5)

2. Due to the Appellant having a law degree, her mediation experience, her management experience and her owning her own business, her immediate supervisor, Attorney Deanna Baker, contacted the Human Resources office, via e-mail, and advocated that the Appellant start at a much higher pay than typical. The e-mail states, in relevant part, "Last week we interviewed Judy Thomas. Judy has a Juris Doctorate degree but is not a participating attorney because she has yet to sit for the bar examination. Judy previously worked as a paralegal. She currently runs her own mediation company. She is knowledgeable in the law. She has started her own business and is versed in creating systems that work and modifying those that do not. She has excellent communication skills. Her references, including from an attorney here in NH, were excellent. To be completely candid (sic), I'm not sure how we got so lucky to have someone with her skills and abilities apply for this position!" (State's Exhibit #3 and Testimony of Attorney Baker)
3. In December 2018, difficulties arose with the Appellant working unauthorized overtime. In or around June 2018, the Appellant was informed about the procedure for obtaining approval for compensatory time. (State's Exhibit #7 and Testimony of Attorney Baker)
4. On December 11, 2018, the Appellant emailed Attorney Baker and informed her that she would be working beyond her end time that day. Shortly thereafter, Attorney Baker responded to the email and asked if what she was working on was time sensitive. The Appellant did not respond to Attorney Baker until the next day and did not provide a specific answer. Attorney Baker followed up with more questions and explained what information she needed in order to consider authorizing compensatory time. The Appellant did not answer Attorney Baker's further questions. (State's Exhibit #7 and Testimony of Attorney Baker)
5. On December 14, 2018, Attorney Baker provided the Appellant with a daily time sheet so that she could assess the Appellant's workload in order to assist in managing the workload within her scheduled workweek of 37.5 hours. On December 19, 2018, at 6:18 p.m., the Appellant sent Attorney Baker an email stating that she understood she could not approve a

request for compensatory time but then informed her that she would be working beyond her scheduled hours. The next day, Attorney Baker issued the Appellant a Memorandum of Counsel, reiterating that the Appellant could not work beyond her work schedule without prior approval. Attorney Baker also informed the Appellant that she needed to be paid for time worked and instructed her to include the unauthorized compensatory time on her timecard. (State's Exhibit 7 and Testimony of Attorney Baker)

6. On December 20, 2018 at 3:18 p.m., Attorney Baker sent an email to the Appellant, which states, in relevant part, "I did not write or say that I would not approve requests for comp time. After speaking with HR, I provided you with parameters for requesting approval for comp. time. You chose to see this as me not approving future requests for comp time. You must be compensated for working the unapproved extra time. As such, please include all of the time you worked over the 7.5 hours on your time sheet as 'comp time'. As I have explained, you cannot work beyond normal work hours-7.5-daily without prior approval. In the future, you must receive my approval before you work comp. time. Please consider this to be a memo of counseling on this issue." (State's Exhibit # 13 BS 338)
7. On December 20, 2018, at 4:57 p.m., the Appellant sent an email to Attorney Baker informing her that she could not complete the time sheet during her normal working hours. The Appellant emailed Attorney Baker again at 5:16 p.m. and informed her that she had partially completed her time sheet. Shortly thereafter, Attorney Baker replied and told the Appellant to finish the next day. The Appellant failed to complete it the next day. Attorney Baker informed the Appellant that she would not be working the following day, December 21, 2018. (State's Exhibit # 7)
8. On December 21, 2018, the Appellant emailed Attorney Baker at 6:47 p.m. notifying her that she was still at the office and was seeking approval to work compensatory time. The Appellant sent a second email at 8:08 p.m. This extra time was not authorized.as Attorney Baker informed her in an email the day before that she would not be working on December 21, 2018. (State's Exhibit #7)

9. On Monday, December 24, 2018, the Appellant sent Attorney Baker an email and advised her that she worked 6 hours of compensatory time over the weekend. Attorney Baker was out of the office on Friday, December 21, 2018, and the Appellant did not seek prior approval to work compensatory time from Attorney Baker's supervisor, Attorney Ann Edwards. (State's Exhibit #7)
10. On January 7, 2019, Attorney Baker issued a letter of warning for working unauthorized compensatory time and failure to take corrective action as directed. The letter of warning contained a corrective action plan. The corrective action plan included, but was not limited to, seeking prior approval prior to working outside regular working hours. (State's Exhibit #7)
11. During the course of the Appellant's employment, she alleged that Attorney Baker engaged in discriminatory practices and harassing behaviors. On February 8, 2019, Attorney Baker was made aware of the allegations and that the complaint was forwarded to the Department of Justice and the Division of Personnel. After a complete and thorough investigation, the investigators concluded that the Appellant's allegations were unfounded. (State's Exhibit #14)
12. On February 27, 2019, the Appellant met with Attorney Baker and her supervisor, Attorney Frank Nachman, regarding her probationary performance evaluation. The Appellant received an overall "below expectations" for her probationary performance evaluation. The Appellant believed she received this type of evaluation as retaliation for the claim filed against Attorney Baker participated in discriminatory practices. (Testimony of Attorney Baker and Appellant)
13. The Appellant described it as a poor evaluation. Attorney Baker had her supervisor, Attorney Frank Nachman, attend the performance evaluation. Attorney Baker had learned after she had completed the evaluation, but before she met with the Appellant, that the Appellant had filed a discrimination claim with the Human Rights Commission. (Testimony of Attorney Baker and Appellant)

14. Attorney Baker and Attorney Nachman met with the Appellant to review her evaluation but the Appellant refused to engage in the process and informed Attorney Baker that she wanted to speak with her own attorney. The meeting ended and Attorney Baker later learned that the Appellant was refusing to engage in the process. As a result, Attorney Baker sent the evaluation to the Appellant and informed her that she was welcome to respond in writing. The Appellant did not respond. (State's Exhibit #11 and Testimony of Attorney Baker)
15. Attorney Baker believed that by issuing a clear and honest performance evaluation she and the Appellant would be able to move forward and the Appellant would become successful. (Testimony of Attorney Baker)
16. On April 19, 2019, a Letter of Intent was issued to the Appellant, informing her that it was believed that there were grounds to support disciplinary action, up to and including dismissal. The Intent Letter states, in relevant part, "During the course of the last year, concerns arose that your performance fails to meet the required work standard including, but not limited to, your ability to effectively communicate, to effectively supervise subordinates, to effectively and efficiently manage your time, and your inability to take corrective action as directed. You have received two memorandums of counsel, a letter of warning and an unsatisfactory evaluation. Recently, you have refused to be supervised by refusing to meet with us regarding your evaluation and the corrective action meetings as set forth in the evaluation." (State's Exhibit #12)
17. At the Intent Meeting, Attorney Baker explained the reasons for the meeting and why she believed there was enough information to dismiss the Appellant from State service. The Appellant made no attempt to refute the State's belief, but instead argued that the meeting was a result of discrimination and retaliation for an earlier filing with the Human Rights Commission. The State moved forward with the dismissal. The Appellant was issued a dismissal letter on April 15, 2019. (State's Exhibit #13)

RULINGS OF LAW:

A. Per 1002.02: At any time during the initial probationary period an appointing authority may dismiss an employee without prior warning if that employee fails to meet the work standard or engages in any conduct for which discipline is authorized pursuant to this Part, provided the dismissal is not:

- (1) Arbitrary;
- (2) Illegal;
- (3) Capricious; or
- (4) Made in bad faith.

DISCUSSION and ORDER:

The Appellant argues that she was dismissed because of discriminatory actions and retaliation by Attorney Baker for filing a complaint with the Human Rights Commission. Attorney Baker interviewed and offered the position to the Appellant. Attorney Baker advocated that the Appellant begin her employment with the State at a much higher wage than typical because of her education, experience, and knowledge. Attorney Baker, while advocating for a higher pay for the Appellant, even questioned in an e-mail to HR how the agency got so “lucky” to have the Appellant apply for the position. The Board failed to find even the hint of discrimination or retaliation and, thus, finds the discrimination and retaliation claims to be without merit.

In accordance with Per-A 207.12 (a), “In probationary termination appeals, the board shall determine if the appellant proves by a preponderance of the evidence that the termination was arbitrary, illegal, capricious, or made in bad faith.” Further, the rule states, “Allegations that the appellant does not know the reason(s) for the dismissal, or evidence that the appointing authority took no formal disciplinary action to correct the employee’s unsatisfactory performance or

failure to meet the work standard prior to dismissing the employee, shall not be deemed sufficient to warrant the appellant's reinstatement." In this case, the Appellant was issued two memorandums of counseling and a letter of warning in an attempt to assist her in meeting the work standards. The closing of the Appellant's performance evaluation reads, "Deanna [Baker] and Ann [Edwards] are committed to working with Judy to implement the goals in this evaluation and help her improve in the areas identified that are of concern. We look forward to working toward success with Judy." Two meetings, February 27, 2019 and March 5, 2019, were scheduled to discuss the performance summary with the Appellant but she refused to attend.

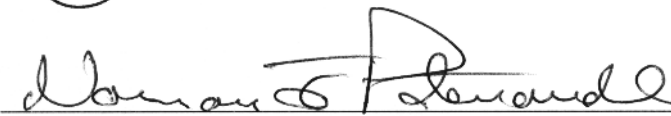
The Board finds that the State made a good faith effort to assist the Appellant with meeting the work standards. The State provided verbal feedback and instructions, feedback and instructions in e-mails, feedback and instructions in memorandums of counsel and in a letter of warning. Considering the Appellant was a probationary employee, the State was under no obligation to put forth such effort in an attempt to assist the Appellant to become successful.

Having carefully considered the evidence and arguments presented, the Board unanimously voted to DENY the appeal and to uphold the Commission's decision to dismiss the Appellant.

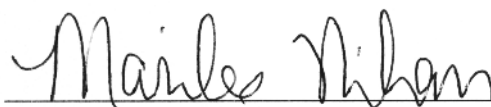
THE PERSONNEL APPEALS BOARD



Chair Christopher Nicolopoulos, Esq.



Vice Chair Norman Patenaude, Esq.



Commissioner Marilee Nihan

cc: Lorrie Rudis, Director of Personnel, 28 School Street, Concord, NH 03301
Jennifer Ramsey, Esq., Via email
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